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IN THE

Supreme Court of the United States

October Term, 1942.

No. 603

STATE OF OHIO, on the relation of S. H. SQUIRE, Superintendent of Banks in Charge of the Liquidation of The Union Trust Company of Cleveland, Ohio,

Petitioner,

vs.

CLARENCE H. PORTER,

Respondent,

Petition for Writ of Certiorari to the Supreme Court of the State of California, and Brief in Support Thereof.

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IN THE

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No. .....

STATE OF OHIO, on the relation of S. H. SQUIRE, Superintendent of Banks in Charge of the Liquidation of The Union Trust Company of Cleveland, Ohio,

Petitioner,

vs.

CLARENCE H. PORTER,

Respondent,

Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Superintendent of Banks of the State of Ohio respectfully petitions that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of California in that certain cause entitled "*State of Ohio, on the Relation of S. H. Squire, Superintendent of Banks in Charge of the Liquidation of The Union Trust Company of Cleveland, Ohio, Plaintiff and Respondent, vs. Clarence H. Porter, Defendant and Appellant,*" and numbered "L. A. No. 18302" on the records of said state court.

A. The Opinions of the Courts Below.

The opinion of the California Supreme Court in this cause was filed October 2, 1942, and is reported at 21 Adv. Cal. 46, 129 P. (2d) 691; it is also set forth at R. 56-63. The opinion in the companion cases is reported in 21 Adv. Cal. 59, 129 P. (2d) 698, and is set forth at R. 69-71.

The California Supreme Court, with two of the Justices dissenting [R. 63-69], reversed the judgment of the Superior Court for Los Angeles County in favor of the petitioner here, the plaintiff below. The trial court's opinion is not reported, but its judgment appears at R. 14.

The hearing in the state supreme court followed an appeal by the defendant below, the respondent here, to the District Court of Appeal [R. 15]. The opinion of that intermediate appellate court, which also reversed the judgment of the trial court, was filed January 15, 1942. Since the case was later transferred to the California Supreme Court for hearing and determination, this opinion is not officially reported. However, it is unofficially reported at 49 Adv. Cal. App. 224, 121 P. (2d) 538; it is also set forth at R. 44-54.

B. Summary Statement of the Matter Involved.

This is an action against a California stockholder of The Union Trust Company of Cleveland, Ohio, to recover upon a double liability assessment levied against stockholders by the Ohio Superintendent of Banks as statutory liquidator. The facts are stipulated [R. 20-34]. The Union Trust Company was a state bank organized under the banking laws of Ohio [R. 22]. The outstanding capi-

tal stock consisted of 914,000 shares of $25 par value [R. 25]. The respondent, Clarence H. Porter, was at all times material here the owner and holder of 560 shares [R. 27-28].

On February 27, 1933, The Union Trust Company was unable to meet its obligations in the regular course of business and declined to permit the withdrawal of more than five per cent of any deposit [R. 23, 29-32]. The bank thereafter continued to operate upon this restricted basis by direction of the Superintendent of Banks [R. 23, 32-33]. On April 8, 1933, the Superintendent of Banks appointed a conservator "for the purpose of conserving its business and assets pending further disposition thereof as provided by law" [R. 23-24, 33-34].

On June 15, 1933, the Superintendent of Banks determined that The Union Trust Company was in an unsound condition to transact a banking business and thereupon took possession for the purpose of liquidation [R. 24].

On July 30, 1934—following various investigations, audits, accountings and evaluations—the superintendent found that the bank's liabilities exceeded its assets to the extent of more than $25,000,000 [R. 25, 34]. The aggregate par value of the outstanding capital stock of The Union Trust Company amounted to $22,850,000 [R. 25]. Accordingly, the superintendent thereupon determined, by reason of the deficiency, that it was necessary to assess the individual liability of the stockholders at one hundred per cent of the par value of the shares [R. 25-26, 34].

Thereafter and on July 30, 1934, the Ohio Superintendent of Banks levied an assessment of one hundred per cent against all stockholders of The Union Trust Company [R.

25-26, 34]. On August 1, 1934, the superintendent caused notice of the assessment to be mailed to all stockholders, requesting payment on or before November 1, 1934 [R. 26, 34].

On May 29, 1936, Porter had failed to pay his assessment and was residing in California. On that date, the Ohio Superintendent of Banks commenced this action upon the assessment by filing his complaint in the Superior Court for Los Angeles County [R. 1-7, 28].

Porter answered [R. 10-12], setting up as an affirmative defense the contention that enforcement of the assessment in California was precluded by the provisions of Section 359 of the California Code of Civil Procedure, which provides that "such actions must be brought within three years after . . . the liability was created."

The trial court rendered judgment against Porter for the full amount of the assessment [R. 14, 28]. Porter then appealed to the District Court of Appeal [R. 15]. That court reversed the judgment [R. 44]. Thereafter, upon petition of the Ohio Superintendent of Banks, the California Supreme Court ordered the cause transferred there and likewise reversed the judgment of the trial court [R. 55, 56].

Because the California Supreme Court refused to give full faith and credit to the Ohio assessment, and denied to the Ohio Superintendent of Banks privileges and immunities accorded the California Superintendent of Banks on parallel facts, the Ohio Superintendent seeks review in this Honorable Court.

C. Jurisdictional Statement.

In support of the jurisdiction of this Honorable Court to review the cause by writ of certiorari, the petitioner respectfully represents (Rule 12, par. 1):

(1) Statutory Provision Sustaining Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937; 28 U. S. C. Section 344(b) (1934).

That this is a "cause wherein a final judgment . . . has been rendered . . . by the highest court of a state in which a decision could be had" is shown by the provisions of Article VI, Sections 1 and 4, of the California Constitution (Cal. Stats. (1929) pp. xxi, xxiii) and Rules XXI and XXX of the Rules of the California Supreme Court, which are quoted in Appendix A [R. 56].

By this judgment there is drawn in question the validity of Section 359 of California's Code of Civil Procedure[1] as applied to the petitioner's statutory cause of action upon the Ohio assessment. As applied by the California Supreme Court in this cause, said Section 359 is repugnant to Article IV, Sections 1 and 2, of the Constitution of the United States—the full faith and credit and the privileges and immunities clauses [R. 63-69].

Furthermore, the petition specially set up and claimed in the courts of California certain title, and certain rights, privileges and immunities, by virtue of Sections 1 and 2

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[1]Code of Civil Procedure of the State of California (1872), p. 93, §359; Deering (1941), p. 152, §359.

of Article IV—namely that the integrity of the Ohio assessment sued upon, and the force of the Ohio statutes upon which the petitioner's cause of action is predicated, are guaranted by those clauses of the Constitution.

(2) The Validity of a State Statute Is Involved.

As stated, the validity of Section 359 of the California Code of Civil Procedure is involved. (Code of Civil Procedure of the State of California (1872), p. 93, §359; Deering (1941), p. 152, §359.

The validity of that statute, as applied in this cause, has been upheld by a majority of the justices of the California Supreme Court [R. 56, 61, 63]. Closely connected with Section 359 is Section 312 of the same code. Both appear under the same title, "Time of Commencing Civil Actions"; and 312 is the first section under that title.

Section 312 provides:

> "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have *accrued*, unless where, in special cases, a different limitation is prescribed by statute."

Section 359 provides:

> "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was *created*."

(3) The Date of the Judgment.

October 2, 1942 is the date of filing of the judgment of the California Supreme Court sought to be reviewed [R. 56]. Thirty days later, on November 1, 1942, this judgment became final (Cal. Sup. Ct. Rules XXI and XXX, Appendix A); and the remittitur issued on November 6, 1942 [R. 72].

(4) Nature of Case and Ruling Below.

The ruling of the California Supreme Court brings this cause within the jurisdictional provisions relied upon (§237(b) of the Judicial Code as amended by the Act of Feb. 13, 1925, Chap. 229, §1, 43 Stat. 937; 28 U. S. C. §344(b) (1934).) No factual determination was necessary, for the cause was submitted upon a written stipulation [R. 14, 20]. Section 1875(3) of the Code of Civil Procedure permits the courts of California to take judicial notice of the laws of other states and of the United States.[2] And the stipulation of facts in this cause so provides with respect to the law of Ohio [R. 28-29].

The assessment sued upon was levied July 30, 1934, by the Ohio Superintendent of Banks against the stockholders of The Union Trust Company of Cleveland in accordance with the statutes of Ohio [R. 25-26, 34]. The petitioner's cause of action arises by force of Section 710-75 of the General Code of the State of Ohio (108 Ohio Laws (1919) 97, §75) providing:

> "Stockholders of banks shall be held individually responsible, equally and ratably, and not one for

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[2]Code of Civil Procedure of the State of California (1872), p. 492, §1875 (3), as amended by Cal. Stats. (1927), p. 110; Deering (1941), pp. 643-644, §1875 (3).

> another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. . . . At any time after taking possession of the bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders."

Section 710-95 of the Ohio General Code (108 Ohio Laws (1919) 103, §95) contains further provision for the determination and enforcement of the stockholders' liability. Both Section 710-75 and Section 710-95, and Article XIII, Section 3, of the Ohio Constitution, pursuant to which these statutes were enacted, are hereinafter set forth as Appendix B. Together, they constitute the material provisions of the Ohio law upon which the petitioner's cause of action is grounded.

The petitioner brought this action on May 29, 1936, to enforce payment by a California stockholder of the assessment so levied under Ohio law [R. 28]. The California Supreme Court held that the action was precluded by the provisions of Section 359 of California's Code of Civil Procedure which states that "such actions must be brought within three years after . . . the liability was created" [R. 56, 60, 63].

Inasmuch as the petitioner's action was admittedly brought within three years after the levy of the assessment sued upon, the California Supreme Court necessarily went behind the assessment and commenced the operation of Section 359 prior to the existence of the Ohio statutory cause of action sought to be enforced. Specifically, the

holding was that "the liability upon which the present action was based certainly was created at least as early" as February 27, 1933, when The Union Trust Company commenced restricting the withdrawal of deposits [R. 60, 66].

Thus the California Supreme Court refused to recognize that the Ohio Superintendent's suit was founded upon the assessment; refused to recognize that, by force of the Ohio statutes, the action of the Ohio Superintendent in levying the assessment on July 30, 1934, gave rise to a statutory obligation enforcible against all stockholders of The Union Trust Company. Furthermore, the judgment of the California Supreme Court ignores the fact that the courts of Ohio have consistently recognized and enforced the obligation of assessments similarly levied by the Ohio Superintendent of Banks;[3] in fact, have on more than one occasion recognized and enforced, at the suit of the superintendent, the identical assessment sued upon in this cause.[4]

Hence the decision of the state court constitutes a refusal by California to give the "public acts" of Ohio the

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[3]*Squire v. Standen*, 135 Ohio St. 1, 18 N. E. (2d) 608 (1939); *Squire v. Solinski*, 132 Ohio St. 180, *sub nom Squire v. Borton & Borton*, 5 N. E. (2d) 479 (1936); *State v. Murfey, Blossom & Co.*, 131 Ohio St. 289, 2 N. E. (2d) 866 (1936); *Lien v. Fechheimer*, ... Ohio App. ....., 44 N. E. (2d) 265 (1942); *State v. Cruikshank*, 51 Ohio App. 61, 199 N. E. 611 (1935); *Baumgardner v. State*, 48 Ohio App. 5, 21; 192 N. E. 349, 357 (1934).

[4]*Squire v. Standen*, 135 Ohio St. 1, 18 N. E. (2d) 608 (1939); *S. H. Squire, Supt. of Banks v. Abbott*, 8 Ohio Ops. 134 (1937).

full faith and credit required by Article IV, Section 1, of the Federal Constitution. The federal right asserted by the petitioner has been denied by the highest court of California, and a substantial question of constitutional law thus has arisen.

The decisions require full faith and credit to be given in the courts of California to the assessment levied by the petitioner pursuant to the statutes of Ohio, thereby sustaining the jurisdiction of this Honorable Court in this cause:

Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589, 79 L. ed. 1100 (1935);

Chandler v. Peketz, 297 U. S. 609, 56 S. Ct. 602, 80 L. ed. 881 (1936);

Converse v. Hamilton, 224 U. S. 243, 32 S. Ct. 415, 56 L. ed. 749 (1912).[5]

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[5]To the same effect are:

Titus v. Wallick, 306 U. S. 282, 292; 59 S. Ct. 557, 83 L. ed. 653, 660 (1939);

Sovereign Camp v. Bolin, 305 U. S. 66, 59 S. Ct. 35, 83 L. ed. 45 (1938);

Adam v. Saenger, 303 U. S. 59, 58 S. Ct. 454, 82 L. ed. 649 (1938);

John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178, 57 S. Ct. 129, 81 L. ed. 106 (1936);

Milwaukee County v. M. E. White Co., 296 U. S. 268, 56 S. Ct. 229, 80 L. ed. 220 (1935);

Roche v. McDonald, 275 U. S. 449, 48 S. Ct. 142, 72 L. ed. 365 (1928);

Marin v. Augedahl, 247 U. S. 142, 38 S. Ct. 452, 62 L. ed. 1038 (1918);

Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641, 52 L. ed. 1039 (1908);

Glenn v. Liggett, 135 U. S. 533, 10 S. Ct. 867, 34 L. ed. 262 (1890);

Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475 (1866);

cf. Rankin v. Barton, 199 U. S. 228, 26 S. Ct. 29, 50 L. ed. 163 (1905).

Although holding that "the liability upon which the present action was based . . . was created" before the assessment sued upon came into existence [R. 60], the California Supreme Court admitted that as to a California assessment the liability would be held to be "created", within the meaning of Section 359 of the California Code of Civil Procedure, at the time the assessment was levied [R. 62]; that if this cause involved an assessment levied by the California Superintendent of Banks against stockholders of a California state bank, the liability would be held to be "created" when the California assessment was levied—and at no earlier date.[6]

The California Supreme Court thus denied to the petitioner in this cause the privileges and immunities which that court accords the California Superintendent of Banks under like circumstances. And since the privileges and immunities guaranteed by the Federal Constitution (Art. IV, §2) include "the right to the usual remedies for the collection of debts",[7] the action of the California Supreme Court also abridges the petitioner's constitutional rights in that respect.

Accordingly, this cause presents a second substantial question of constitutional law involving the privileges and immunities guaranteed by Article IV, Section 2; and it would seem clear in principle that the California Supreme Court has decided the question "in a way probably not in accord with applicable decisions of this court,"

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[6] *Richardson v. Craig*, 11 Cal. (2d) 131, 77 Pac. 1077 (1938).

[7] *Maxwell v. Bugbee*, 250 U. S. 525, 537; 40 S. Ct. 2, 63 L. ed. 1124, 1130 (1919).

although it is believed that the precise question has not heretofore been determined by this Honorable Court.

See:

McKnett v. St. Louis & S. F. Ry. Co., 292 U. S. 230, 54 S. Ct. 690, 78 L. ed. 1227 (1934);

Blake v. McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. ed. 432 (1898);

Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449 (1871).[8]

The petitioner therefore asserts that this cause involves federal questions of substance calling for review on writ of certiorari pursuant to Rule 38, paragraph 5(a), in this:

First: That the California Supreme Court has decided in this cause a substantial question under the full faith and credit clause (U. S. Const. Art. IV, §1) in a way not in accord with applicable decisions of this Court [R. 61, 67];

Second: That the California Supreme Court has also decided in this cause a substantial question under the privileges and immunities clause (U. S. Const. Art. IV, §2) in a way probably not in accord, in principle, with applicable decisions, although it appears that the precise question has not heretofore been determined by this Court [R. 62, 63].

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[8]To the same effect are:

Douglas v. New York, N. H. & H. R. R. Co., 279 U. S. 377, 49 S. Ct. 355, 73 L. ed. 747 (1929);

Chambers v. Baltimore & O. R. R. Co., 207 U. S. 142, 28 S. Ct. 34, 52 L. ed. 143 (1907);

Miles v. Ill. Central R. R. Co., 315 U. S. 698, 62 S. Ct. 827, 86 L. ed. (Adv. Ops.) 766 (1942).

(5) Substantial Federal Questions Are Involved.

Upon the grounds hereinabove set forth under (4) "Nature of Case and Ruling Below", the petitioner asserts that the federal questions decided by the California Supreme Court in this cause are substantial in character.

(6) The Federal Questions Were Raised in the Courts Below.

In accordance with California practice, the constitutional questions sought to be reviewed were raised at the trial and in the brief submitted by the petitioner to the trial court [R. 52; Appendix C]. And the trial court based its judgment in favor of the petitioner upon the ground that California was compelled to give full faith and credit to the "public acts" of Ohio and, therefore, could not disregard the statutory obligation sued upon [R. 52].

The California District Court of Appeal reversed the judgment of the trial court [R. 44, 52], stating:

> "Respondent argues at length that, under the full faith and credit clause, our California courts must enforce the finding of the Ohio superintendent in which he assessed the liability by the defendant stockholder . . . . This is not necessary . . . ." [R. 53-54.]

Again, in the California Supreme Court the constitutional questions were argued and presented in the briefs of the petitioner; but that court likewise denied the petitioner's contentions, stating:

> "The plaintiff contends that the suit is on the 'assessment'; that the 'assessment' is a 'public act' with-

in the scope of article IV, section 1 of the federal Constitution and must be accorded full faith and credit; . . . that such result is in accord with *Richardson v. Craig*, 11 Cal. (2d) 131 (77 P. (2d) 1077), which holds that the liability is created at the time of the assessment; and that to give a different interpretation of the Ohio law would be to violate article IV, section 2 of the United States Constitution, providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

* * * * * * * *

"To give proper effect to the Ohio law in this case obviously is not a violation of the privileges and immunities clause of the United States Constitution. The time limitation of said section 359 is applied uniformly to compute the applicable period of limitation for the commencement of the action from the time the liability was created." [R. 61-62, 63.]

The California Supreme Court ruled that the Ohio Superintendent of Banks was not entitled in this cause to the same privileges and immunities as California accords to her own Superintendent of Banks under parallel circumstances [R. 67].

The state supreme court further ruled that the courts of California are not compelled by the full faith and credit clause (U. S. Const. Art. IV, §1) to enforce—as do the Ohio courts—the obligation arising under the statutes of Ohio in the form of the assessment of July 30, 1934; and that therefore the California courts will look behind the assessment sued upon in order to hold the petitioner's cause of action precluded by Section 359 of the California Code of Civil Procedure [R. 60, 61, 63].

The dissenting justices were of the opinion that the courts of California could not thus ignore the Ohio statutory obligation but must give to the assessment the same faith and credit as accorded by the courts of Ohio [R. 67-69].

D. Questions Presented for Review.

The following questions are presented for review in this cause:

(1) In an action brought in California by the Ohio Superintendent of Banks against a California stockholder of an Ohio state bank to recover upon a double liability assessment levied against stockholders pursuant to Ohio statutes, does not the refusal of the California courts to recognize and enforce the Ohio assessment constitute a denial of the full faith and credit required to be given to "public acts" of a sister state by Article IV, Section 1, of the Constitution of the United States?

(2) In such action, where it appears that under the law of Ohio the levy of the assessment gave rise to a statutory obligation enforcible against the stockholders at the suit of the Ohio Superintendent of Banks, does not the full faith and credit clause (U. S. Const. Art. IV, §1) compel the courts of California to recognize and enforce the statutory obligation sued upon?

(3) In such action, where it appears that the courts of Ohio have recognized and enforced, at the suit of the Ohio Superintendent of Banks, the identical assessment sued upon in California, does not the application of Section 359 of the California Code of Civil Procedure so as to preclude the suit by resorting to a lapse of time prior to

the existence of the Ohio Superintendent's cause of action constitute a denial of the full faith and credit required (U. S. Const. Art. IV, §1) to be given to the "public acts" of Ohio?

(4) Where such action was brought within three years after the levy of the assessment which gave rise to the Ohio Superintendent's statutory cause of action, does not the application of Section 359 of the California Code of Civil Procedure—providing that "such actions must be brought within three years after . . . the liability was created"—so as to bar the action by going behind the assessment and commencing the operation of Section 359 prior to the existence of the obligation sought to be enforced constitute a denial by the California courts of the full faith and credit required by Article IV, Section 1, of the Federal Constitution?

(5) Does not the California Supreme Court's ruling that the Ohio Superintendent of Banks is not entitled to the same privileges and immunities as the courts of California accord to the California Superintendent of Banks under parallel circumstances constitute a violation of Article IV, Section 2, of the Constitution of the United States?

(6) Since the courts of California—in applying Section 359 of the California Code of Civil Procedure to an action brought by the California Superintendent of Banks to recover upon a double liability assessment levied against stockholders of a California state bank—refuse to invoke against the California Superintendent a lapse of time prior to the levy of his assessment, does not the California Supreme Court's decision invoking a lapse of time prior to the levy of the Ohio Superintendent's assess-

ment, and thus applying Section 359 so as to preclude his cause of action grounded upon parallel facts, constitute an unwarranted discrimination abridging the privileges and immunities guaranteed by Article IV, Section 2, of the Federal Constitution?

E. Reasons for Granting the Writ and Specification of Errors.

The writ prayed for should be allowed for the following reasons:

(1) The California Supreme Court erred in its decision:

(a) By disregarding that under Ohio law the assessment sued upon in this cause gave rise to a statutory cause of action in favor of the Ohio Superintendent of Banks and a correlative statutory liability on the part of the stockholders;

(b) By ignoring that the Ohio Superintendent's cause of action, under Ohio law, is grounded upon the statutory assessment:

(c) By refusing to give to the Ohio assessment the same faith and credit in the courts of California as by law and usage is given to such an order in the courts of Ohio; and

(d) By thus denying full faith and credit to the "public acts" of Ohio, as required by Article IV, Section 1, of the Constitution of the United States.

The California Supreme Court completely ignored in its opinion the case of *Broderick v. Rosner*, 294 U. S. 629, 55 S. Ct. 589, 79 L. ed. 1100 (1935), where this

Honorable Court held, under circumstances analogous to those at bar, that on the pretext of regulating procedure a state's refusal to enforce a statutory assessment coming from another state constitutes a denial of full faith and credit to the "public acts" of the sister state.

Other similar and important decisions of this Court which the majority opinion of the state supreme court likewise ignores, and which compel California to recognize and enforce the statutory assessment upon which this action is grounded, include:

Chandler v. Peketz, 297 U. S. 609, 56 S. Ct. 602, 80 L. ed. 881 (1936);

Marin v. Augedahl, 247 U. S. 142, 38 S. Ct. 452, 62 L. ed. 1038 (1918);

John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178, 57 S. Ct. 129, 81 L. ed. 106 (1936);

Sovereign Camp v. Bolin, 305 U. S. 66, 59 S. Ct. 35, 83 L. ed. 45 (1938).

The decision of the Supreme Court of the State of California in this cause conflicts with the foregoing decisions of this Honorable Court.

(2) The California Supreme Court also erred in applying Section 359 of the California Code of Civil Procedure so as to preclude the Ohio Superintendent's suit by going behind the Ohio statutory assessment as if it did not exist and resorting to a lapse of time prior to the existence of the cause of action sued upon.

To bar an obligation entitled to full faith and credit, by invoking a lapse of time prior to the existence of the

cause of action, is manifestly unconstitutional. This is established by decisions ignored by the majority opinion of the California court:

Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475 (1866);

Glenn v. Liggett, 135 U. S. 533, 10 S. Ct. 867, 34 L. ed. 262 (1890);

Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641, 52 L. ed. 1039 (1908);

Roche v. McDonald, 275 U. S. 449, 48 S. Ct. 142, 72 L. ed. 365 (1928);

Milwaukee County v. M. E. White Co., 296 U. S. 268, 56 S. Ct. 229, 80 L. ed. 220 (1935);

cf. Rankin v. Barton, 199 U. S. 228, 26 S. Ct. 29, 50 L. ed. 163 (1905).

The decision of the Supreme Court of the State of California in this cause is in conflict with the foregoing decisions of this Honorable Court.

(3) The California Supreme Court further erred in its decision in this cause by ruling that the Ohio Superintendent of Banks is not entitled to the same privileges and immunities as the courts of California accord to the California Superintendent of Banks under like circumstances. This ruling constitutes a violation of Article IV, Section 2, of the Constitution of the United States.

McKnett v. St. Louis & S. F. Ry. Co., 292 U. S. 230, 54 S. Ct. 690, 78 L. ed. 1227 (1934);

Blake v. McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. ed 432 (1898);

Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449 (1871).

The decision of the Supreme Court of the State of California in this cause conflicts, in principle, with the foregoing decisions of this Honorable Court.

(4) Inasmuch as the courts of California—in applying Section 359 of the California Code of Civil Procedure to an action brought by the California Superintendent of Banks to recover upon a double liability assessment levied against stockholders of a California state bank—refuse to invoke against the California Superintendent a lapse of time prior to the levy of his assessment, the state supreme court further erred by invoking a lapse of time prior to the existence of the Ohio Superintendent's assessment, and thus applying Section 359 so as to preclude his cause of action grounded upon parallel facts.

The petitioner asserts that such unwarranted discrimination on the part of California abridges the privileges and immunities guaranteed by Article IV, Section 2, of the Federal Constitution, although it is believed that the precise question has not heretofore been determined by this Honorable Court.

Wherefore, your petitioner, the Superintendent of Banks of the State of Ohio, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of California, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered "L. A. No. 18302" and entitled on its docket "State of Ohio, on the relation of S. H. Squire, Superintendent of Banks in Charge of the Liquidation of

The Union Trust Company of Cleveland, Ohio, *Plaintiff and Respondent, v.* Clarence H. Porter, *Defendant and Appellant*"; that the said judgment of the said Supreme Court of the State of California may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Dated: December 17, 1942.

S. H. SQUIRE,

Superintendent of Banks for the State of Ohio, in charge of the liquidation of the business and property of The Union Trust Company of Cleveland, Ohio,
Petitioner,

By WILLIAM C. MATHES,
Counsel for Petitioner.

THOMAS J. HERBERT,
Attorney General of the State of Ohio;

E. S. LINDEMANN,
Special Counsel to the Attorney General of the State of Ohio;

MATHES & SHEPPARD and
GORDON F. HAMPTON,
of Counsel.

APPENDIX A

That this is a "cause wherein a final judgment . . . has been rendered . . . by the highest court of a State in which a decision could be had" is shown by the following provisions from the California Constitution and the Rules of the California Supreme Court:

> "The judicial power of the state shall be vested . . . in a supreme court, district courts of appeal, superior courts, such municipal courts as may be established in any city or city and county, and such inferior courts as the legislature may establish . . ."
>
> (California Constitution, Art. VI, §1.)

———0———

> "The supreme court shall have appellate jurisdiction on appeal from the superior courts . . . in all cases, matters and proceedings pending before a district court of appeal, which shall be ordered by the supreme court to be transferred to itself for hearing and decision . . ."
>
> (California Constitution, Art. VI, §4.)

"RULE XXX—APPLICATIONS FOR REHEARING, AND HEARING AFTER DECISION

"Section 1. Unless otherwise specially ordered, or a rehearing be granted, judgments of the Supreme Court in bank become final at the end of the thirtieth day after the date of pronouncement.

"Application for a rehearing of any cause decided by the Supreme Court in bank or for a hearing in bank after a decision in department, and application for a rehearing of any cause, except a criminal cause, decided by a District Court of Appeal must be served on the adverse party and filed with proof of service within twenty days after the judgment is pronounced . . ."

(Cal. Sup. Ct. Rule XXX.)

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"RULE XXI—OPINION TRANSMITTED WITH REMITTITUR

When a case on appeal or certiorari is finally decided, a certified copy of the opinion in the case shall be transmitted with the remittitur to the court or tribunal whose record is reviewed."

(Cal. Sup. Ct. Rule XXI.)

APPENDIX B

The material provisions of the Ohio law upon which the petitioner's cause of action is grounded are:

> ". . . stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."
>
> (Ohio Const., Art. XIII, §3, as amended September 3, 1912.)

———0———

> "Stockholders of banks shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares . . . . At any time after taking possession of a bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders."
>
> (108 Ohio Laws (1919) 97, §75, as amended 115 Ohio Laws (1933) 126, §1; Ohio General Code, §710-75.)

"The superintendent of banks, upon taking possession of the business and property of any bank, shall have, exercise and discharge the following powers, authority and duties, without notice or approval of court, but subject to the provisions of this chapter, to-wit:

* * *

"9. If he ascertains that the assets of such bank will be insufficient to pay its debts and liabilities, to enforce the individual liability of each shareholder thereof as provided in section 710-75 of the General Code. Until an order to declare and pay a final dividend shall be entered in the liquidation proceedings the right to enforce such liability is hereby vested exclusively in the superintendent of banks.

"10. For the purpose of executing and performing any of the powers and duties hereby conferred upon him, in his name as superintendent of banks in charge of the liquidation of such bank, to institute, prosecute and defend any and all actions or proceedings within or without this state . . . ."

(108 Ohio Laws (1919) 103, §95, as amended 115 Ohio Laws (1933) 136, §1; Ohio General Code §710-95.)

APPENDIX C

In the brief submitted by the petitioner to the trial court appears the following ("Plaintiff's Memorandum Following Oral Argument", pp. 54, 65-66):

> "Article 4, Section 1, of the Constitution of the United States requires that the courts of California accord full faith and credit to the assessment of the Ohio Superintendent of Banks in the cases at bar."
>
> * * *
>
> "Manifestly, there exists no reason whatever to prompt the running of our statute of limitations prior to the levy of assessment in the case at bar that did not also, equally and likewise exist in *Richardson v. Craig*. In other words, there exists no reason, either of logic or of policy, which could possibly justify the court of California to start the running of our statute of limitations against Ohio's Superintendent of Banks at any earlier time than against California's Superintendent of Banks."
>
> * * *
>
> "And it would seem beyond question that any attempt to apply our statute to the cases at bar in such a manner as to start the period of limitation running prior to the Ohio Superintendent's assessment would amount to an unconstitutional denial of full faith and credit to that assessment (*Christmas v. Russell, supra; Rankin v. Barton, supra; Broderick v. Rosner, supra*).

"Furthermore, we submit that for this Court to adopt the defendants' contentions—and apply our statute to the cases at bar in a manner different and less favorable to the *Ohio* Superintendent than the same statute would be applied to a cause of action of the *California* Superintendent under substantially identical circumstances—would violate the constitutional privileges conferred by Section 2 of Article IV of the Constitution of the United States."

IN THE

Supreme Court of the United States

October Term, 1942.

No.....

STATE OF OHIO, on the relation of S. H. SQUIRE, Superintendent of Banks in Charge of the Liquidation of The Union Trust Company of Cleveland, Ohio,

Petitioner,

vs.

CLARENCE H. PORTER,

Respondent.

BRIEF OF OHIO SUPERINTENDENT OF BANKS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

I.

The Opinions of the Courts Below.

Full references to the opinions of the California courts in this cause (Rule 27, par. 2(b)) are given in the Petition under "A. The Opinions of the Courts Below"; and the petitioner requests leave, in the interest of brevity, to incorporate that portion of the Petition by reference here.

II.

Jurisdictional Statement.

The grounds upon which the jurisdiction of this Honorable Court is invoked (Rule 27, par. 2(c)) are stated in the Petition under "C. Jurisdictional Statement"; and the petitioner requests leave, in the interest of brevity, to incorporate that portion of the Petition by reference here.

III.

Statement of the Case.

A statement of the case (Rule 27, par. 2(d)) is set forth in the Petition under "B. Summary Statement of the Matter Involved"; and the petitioner requests leave, in the interest of brevity, to incorporate that portion of the Petition by reference here.

IV.

Specification of Errors.

The errors urged (Rule 27, par. 2(e)) are specified in the Petition under "E. Reasons for Granting Writ and Specification of Errors"; and the petitioner requests leave, in the interest of brevity, to incorporate that portion of the Petition by reference here.

V.

Summary of the Argument.

A. The statutes of Ohio, as manifested by assessments of the Ohio Superintendent of Banks, are "public acts" entitled to full faith and credit by virtue of Article IV, Section 1, of the Federal Constitution.

B. The Ohio assessment, being a substantive right conferred by statute, is entitled to the same faith and credit in California as in Ohio.

C. The courts of Ohio consistently recognize and enforce the obligations of bank stockholders arising from the Ohio Superintendent's assessments.

D. California's refusal in the case at bar to recognize the Ohio Superintendent's statutory cause of action, or to enforce the correlative liability of the stockholder, constitutes a denial of full faith and credit to the "public acts" of Ohio.

E. It is unconstitutional for California to go behind the statutory assessment and resort to a lapse of time prior to the existence of the Ohio Superintendent's cause of action in order to apply Section 359 of the California Code of Civil Procedure.

F. California's discrimination as between assessments levied under parallel facts in Ohio and California abridges the privileges and immunities guaranteed by Article IV, Section 2, of the Federal Constitution.

VI.

Argument.

A. THE STATUTES OF OHIO, AS MANIFESTED BY ASSESSMENTS OF THE SUPERINTENDENT OF BANKS, ARE "PUBLIC ACTS" ENTITLED TO FULL FAITH AND CREDIT BY VIRTUE OF ARTICLE IV, SECTION 1, OF THE FEDERAL CONSTITUTION.

The Ohio statutes imposing bank stockholders' liability, and providing for its enforcement by the Superintendent of Banks, are Sections 710-75 and 710-95 of the General Code of the State of Ohio (108 Ohio Laws (1919) 97, 103; Appendix B).

Section 710-75 provides:

> "Stockholders of banks shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. . . . *At any time after taking possession of a bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders.*" (Italics added.)

The right to impose such liability is established by Article XIII, Section 3, of the Ohio Constitution [Appendix B].

These Ohio statutes find their source in the National Bank Act. In *State v. Murfey, Blossom & Co.*, 131 Ohio

St. 289, 305, 2 N. E. (2d) 866, 873 (1936), the Ohio Supreme Court said:

> "The state banking law of Ohio was practically copied from the National Bank Act of the United States (12 U. S. C. A., sec. 21 *et seq.*), and naturally the germane decisions of the Federal Courts are most persuasive."

Indeed, the Ohio statutes follow the National Bank Act almost word for word.[9] Interestingly enough, the descriptive term "assessment" crept into usage through the courts. Nowhere in the sections of the National Bank Act relating to the double liability of stockholders is the word to be found.[10] Since 1880 this Court has employed "assessment" to connote the determination of the stockholder's obligation under the National Bank Act.[11] In Ohio the term "assessment" likewise crept into usage through the courts.[12]

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[9] *Baumgardner v. State*, 48 Ohio App. 5, 16-25, 192 N. E. 349, 355-361 (motion to certify denied by Ohio Sup. Ct., 1934).

[10] R.S. §§ 5151, 5220, 5234 (1875); 19 Stat. 63; 12 U.S.C. §§ 63, 64, 181, 191, 192 (1934).

[11] *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476 (1869);
Casey v. Galli, 94 U. S. 673, 24 L. ed. 168 (1877);
United States v. Knox, 102 U. S. 422, 433, 26 L. ed. 216 (1880).

[12] *Lang v. Osborn Bank*, 100 Ohio St. 51, 125 N. E. 105 (1919);
Squire v. Standen, 135 Ohio St. 1, 4, 18 N. E. (2d) 608, 609 (1939);
Baumgardner v. State, 48 Ohio App. 5, 7, 14, 192 N. E. 349, 351, 354 (1934).

Thus the cause of action in the case at bar rests upon a statutory base, and the Ohio Superintendent of Banks is empowered to enforce it both within and without Ohio. (§§710-75, 710-95 of the Ohio General Code; Appendix B.)[18]

As this Court said in *Broderick v. Rosner*, 294 U. S. 629, 643, 644, 55 S. Ct. 589, 79 L. ed. 1100, 1107, 1108 (1935):

> "Here the nature of the cause of action brings it within the scope of the full faith and credit clause. The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of . . . the State of incorporation. . . . In respect to the determination of liability for an assessment, the . . . stockholders submitted themselves to the jurisdiction. . . .
>
> * * * * * * * * *
>
> "The fact that the assessment here in question was made under statutory direction by an administrative officer does not preclude the application of the full faith and credit clause . . . because statutes are 'public acts' within the meaning of the clause."

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[18]Compare:

Christopher v. Brusselback, 302 U. S. 500, 58 S. Ct. 350, 82 L. ed. 388 (1938);

Wheeler v. Greene, 280 U. S. 49, 50 S. Ct. 21, 74 L. ed. 160 (1929).

B. THE OHIO ASSESSMENT, BEING A SUBSTANTIVE RIGHT CONFERRED BY STATUTE, IS ENTITLED TO THE SAME FAITH AND CREDIT IN CALIFORNIA AS IN OHIO.

In the language of *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U. S. 178, 183, 57 S. Ct. 129, 81 L. ed. 106, 109 (1936):

> "Because the statute is a 'public act,' faith and credit must be given to its provisions as fully as if . . . declared by a judgment. . . ."

As Mr. Chief Justice Stone said in *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 276-277, 56 S. Ct. 229, 80 L. ed. 220, 228 (1935):

> "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore *obligations created under the laws* or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." (Italics added.)

C. THE COURTS OF OHIO CONSISTENTLY RECOGNIZE AND ENFORCE THE OBLIGATIONS OF BANK STOCKHOLDERS ARISING FROM THE OHIO SUPERINTENDENT'S ASSESSMENTS.

Cases in which the Ohio courts have recognized and enforced the obligations of assessments similarly levied by the Ohio Superintendent of Banks are:

Squire v. Standen, 135 Ohio St. 1, 18 N. E. (2d) 608 (1939);

Squire v. Solinski, 132 Ohio St. 180, *sub nom Squire v. Borton & Borton*, 5 N. E. (2d) 479 (1936);

State v. Murfey, Blossom & Co., 131 Ohio St. 289, 2 N. E. (2d) 866 (1936);

Lien v. Fechheimer, ... Ohio App. ....., 44 N. E. (2d) 265 (1942);

State v. Cruikshank, 51 Ohio App. 61, 199 N. E. 611 (1935);

Baumgardner v. State, 48 Ohio App. 5, 21, 192 N. E. 349, 357 (1934);

State v. Melaragno, 31 Ohio Law Rep. 627 (1930).

In fact, the Ohio courts have on more than one occasion recognized and enforced, at the suit of the Ohio Superintendent, the identical assessment sued upon in the case at bar:

Squire v. Standen, 135 Ohio St. 1, 18 N. E. (2d) 608 (1939);

S. H. Squire, Supt. of Banks, v. Abbott, 8 Ohio Ops. 134 (1937).

The constitutional command of the full faith and credit clause must be observed, and this Court will examine the laws of Ohio in order to assure that observance.

Adam v. Saenger, 303 U. S. 59, 64, 58 S. Ct. 454, 457, 82 L. ed. 649, 652, 653 (1938);

Titus v. Wallick, 306 U. S. 282, 288, 59 S. Ct. 557, 561, 83 L. ed. 653, 657 (1939).

D. CALIFORNIA'S REFUSAL IN THE CASE AT BAR TO RECOGNIZE THE OHIO SUPERINTENDENT'S STATUTORY CAUSE OF ACTION, OR TO ENFORCE THE CORRELATIVE LIABILITY OF THE STOCKHOLDER, CONSTITUTES A DENIAL OF FULL FAITH AND CREDIT TO THE "PUBLIC ACTS" OF OHIO.

The Ohio Constitution of 1851 provided for double liability of stockholders generally. The statutes enacted pursuant thereto provided for enforcement solely by means of an equitable class suit in the nature of a creditors' bill.

Barrick v. Gifford, 47 Ohio St. 180, 24 N. E. 259 261 (1890);

Bronson v. Schneider et al., 49 Ohio St. 438, 33 N. E. 233, 234 (1892);

Blackburn v. Irvine, 205 Fed. 217, 220, 222 (C. C. A. 3d, 1913);

Irvine v. Bankard, 181 Fed. 206, 211 (C. C. D. Md., 1910), aff'd 184 Fed. 986 (C. C. A. 4th, 1911).

In 1903 the provisions for general stockholders' liability in Ohio were repealed. On September 3, 1912, the con-

stitutional amendment providing for double liability of stockholders of Ohio state bank was adopted [Appendix B]; it went into effect on January 1, 1913.

Allen v. Scott, 104 Ohio St. 436, 135 N. E. 683, 684-685 (1922);

Baumgardner v. State, 48 Ohio App. 5, 192 N. E. 349, 355-357 (motion to certify denied by Ohio Sup. Ct., 1934).

In the first case to arise under the amendment, *Lang v. Osborn Bank*, 100 Ohio St. 51, 54-55, 125 N. E. 105, 106 (1919), the Ohio Supreme Court said:

> "The constitutional amendment of September 3, 1912 . . . needs no aid from legislative enactment. It is clearly self-executing. If however, such aid were required, it was abundantly provided in the general scope of the statutes found in 103 Ohio Laws, 530, as passed April 14, 1913. . . . The right of the superintendent of banks to bring this action for and on behalf of the creditors of the bank, in his capacity as trustee, cannot now be questioned. . . . the stockholders . . . were . . . subject to the liabilities imposed by the . . . constitutional provision and the statutes pertaining thereto."

It was thus settled under Ohio law, as under the National Bank Act, that the statutory liquidator is given the cause of action to enforce the statutory obligation of the stockholders;[14] and the creditors have no cause of action

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[14] *Feldman v. The Standard Trust Bank of Cleveland*, 46 Ohio App. 67, 187 N. E. 743 (motion to certify denied by Ohio Sup. Ct., 1933);

Fulton v. Wetzel, 47 Ohio App. 72, 190 N E. 776; cert. denied, 293 U. S. 531, 55 S. Ct. 207, 79 L. ed. 640 (1934).

except in cases of banks undergoing voluntary liquidation.[15]

Significantly, the California Supreme Court in the case at bar resorts to the unfounded declaration that "February 27, 1933, the day the bank failed to meet its obligations in the ordinary course of business and limited its payments to 5 per cent of any demand deposit or matured obligation marked the beginning of voluntary liquidation." [R. 60.]

There is no possible basis, either in fact or in law, for that statement. The Union Trust Company never undertook voluntary liquidation. The fact is that the stockholders opposed even involuntary liquidation of the bank. (*Squire v. Abbott*, 8 Ohio Ops. 134 (1937).)

As the Ohio Supreme Court stated in *Squire v. Standen*, 135 Ohio St. 1, 4, 18 N. E. (2d) 608, 610 (1939), upon enforcing the identical assessment sued upon in the case at bar:

> "It is . . . shown by the record that on February 27, 1933, the Union Truts Company restricted the withdrawal of funds by its depositors; on June 15, 1933, it was taken over for liquidation by the Superintendent of Banks; and on July 30, 1934 . . .

---

[15]Compare:

Brown v. O'Keefe, 300 U. S. 598, 603-604, 57 S. Ct. 543, 81 L. ed. 827, 833 (1937);

Richmond v. Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864 (1887);

Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476 (1869);

Stephens Fuel Co. v. Bay Parkway National Bank, 109 F. (2d) 186 (C.C.A. 2nd, 1940);

Hall v. Ballard, 90 F. (2d) 939 (C.C.A. 4th, 1937);

Snider v. United Banking & Trust Co., 124 Ohio St. 375, 178 N. E. 840 (1931);

Baumgardner v. State, 48 Ohio App. 5, 192 N. E. 349, 357 (motion to certify denied by Ohio Sup. Ct., 1934).

the superintendent issued an order *levying an assessment* of one hundred per cent or $25 per share upon all stockholders, *in accordance with* Section 710-75, General Code." (Italics added.)

Thus it seems clear the majority opinion of the California Supreme Court seized upon an utterly false premise in order to avoid the Ohio Superintendent's statutory cause of action in the case at bar. As the opinion of the two disesnting justices points out:

> "The opinion ignores the fact that the suits in question are brought upon a statutory assessment that would be fully recognized and enforced in the Ohio courts . . . and thus gives rise to an unconstitutional denial of full faith and credit to the statutes of Ohio and the assessment levied thereunder." [R. 67.]

E. IT IS UNCONSTITUTIONAL FOR CALIFORNIA TO GO BEHIND THE STATUTORY ASSESSMENT AND RESORT TO A LAPSE OF TIME PRIOR TO THE EXISTENCE OF THE OHIO SUPERINTENDENT'S CAUSE OF ACTION IN ORDER TO APPLY SECTION 359 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.

The closing paragraph of the majority opinion in the case at bar reads:

> "We therefore conclude that under the law of Ohio the stockholders' liability here sought to be enforced was created on the 27th day of February, 1933, and that as the action was not brought within three years after that date it is barred by section 359 of our Code of Civil Procedure." [R. 63.]

The California Supreme Court thus refused to recognize the assessment of July 30, 1934. For the majority opinion ignores the fact that the Ohio Superintendent's

cause of action rests upon both the "constitutional provision and the statutes pertaining thereto." (*Lang v. Osborn Bank*, 100 Ohio St. 51, 55, 125 N. E. 105, 106 (1919).)

Obviously, the entire body of relevant Ohio law governs the Ohio Superintendent's cause of action and the stockholder's correlative liability. The provisions of the Ohio Constitution are a vital part of that body of Ohio law. "But," as this Court said in *Whitman v. Oxford National Bank*, 176 U. S. 559, 563, 20 S. Ct. 477, 44 L. ed. 587, 590 (1900):

> ". . . this constitutional provision does not stand alone. The legislature . . . has acted on the subject-matter, and the Constitution and the statutes are to be taken together, as making one body of law; and it serves no good purpose to inquire what rights and remedies a creditor of a corporation might have, or what liabilities would rest upon a stockholder, if either Constitution or statutes stood alone and unaided by the other."

In an unbroken line of decisions this Court has held that assessments levied pursuant to statutes of sister states cannot be ignored.[16] As Professor Dodd points

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[16] *Glenn v. Liggett*, 135 U. S. 533, 10 S. Ct. 867, 34 L. ed. 262 (1890);
Converse v. Hamilton, 224 U. S. 243, 32 S. Ct. 415, 56 L. ed. 749 (1912);
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Marin v. Augedahl, 247 U. S. 142, 38 S. Ct. 452, 62 L. ed. 1038 (1918);
Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589, 79 L. ed. 1100 (1935);
Chandler v. Peketz, 297 U. S. 609, 56 S. Ct. 602, 80 L. ed. 881 (1936);
Sovereign Camp v. Bolin, 305 U. S. 66, 79, 59 S. Ct. 35, 83 L. ed. 45, 52 (1938).

out, [17] the statutory base of the assessment requires its enforcement.[18]

Although Section 359 of the California Code of Civil Procedure is called a statute of limitations, in its application here, it is closely akin to the New Jersey statute in *Broderick v. Rosner,* 294 U. S. 629, 55 S. Ct. 589, 79 L. ed. 1100 (1935).

As Justice Traynor states in the dissenting opinion at bar:

> "Section 359, while located in that part of the Code of Civil Procedure dealing with statutes of limitation generally, is no ordinary statute of limitations. The section requires that actions against stockholders to enforce a liability created by law be brought 'within three years after . . . the liability was created.' The three-year period commences to run from the date the liability is created, irrespective of when the cause of action accrues, and the action might be barred thereunder before any right to sue accrues. . . . This statute, far from prescribing a reasonable period within which an accrued cause of action can be enforced by suit, actually delimits the liability itself." [R. 64.]

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[17]Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926), 39 Harv. L. Rev. 533, 545, 550-552.

[18]On the other hand, where a call or assessment has no statutory base, the full faith and credit clause does not apply. *Great Western Telegraph Co. v. Purdy,* 162 U. S. 329, 16 S. Ct. 810, 40 L. ed. 986 (1896); *id.,* 83 Iowa 430, 50 N. W. 45 (1891); *Great Western Telegraph Co. v. Gray,* 122 Ill. 630, 14 N. E. 214 (1887); Act for Establishment of Telegraphs, Ill. Laws Jan.-Oct. 1849, p. 188.

The full faith and credit clause forbids California from resorting to a lapse of time prior to the existence of the Ohio Superintendent's cause of action in order to apply Section 359 of the California Code of Civil Procedure. In *Rankin v. Barton,* 199 U. S. 228, 230, 231-232, 26 S. Ct. 29, 30, 50 L. ed. 163, 166 (1905), where an analogous situation was presented, this Court said:

> "The question in this case is the application of the statute of limitations of a state to the liability of a stockholder of a national bank before the amount of such liability has been ascertained and assessed by the Comptroller of the Currency. The trial court held the statute applicable, and its judgment was affirmed by the supreme court of the state. . . .
>
> "The administration of the bank's assets is . . . vested in the Comptroller of the Currency. . . . The individual liability of a stockholder can only be enforced by his order. The provision is as much for the benefit of the stockholders as for the United States, and it is indispensable to the bringing of a suit against the stockholder. In other words, the liability dates from the order of the Comptroller."

In *Rawlings v. Ray,* 312 U. S. 96, 99, 61 S. Ct. 473, 474, 85 L. ed. 605, 608 (1941), this Court observed "that the contingent obligation of a stockholder to pay an assessment was rendered absolute by the Comptroller's action in ordering one. . . ."

So, also, as stated in *Baumgardner v. State,* 48 Ohio App. 5, 32, 192 N. E. 349, 361 (motion to certify denied by Ohio Sup. Ct., 1934), the Ohio Superintendent's determination is "the condition precedent to the enforcement of the liability under the provisions of Section 710-75 of the General Code."

Where a similar full faith and credit question arose in *Christmas v. Russell*, 5 Wall. 290, 300, 18 L. ed. 475, 478 (1866) this Court said:

> "But the provision under consideration is not a statute of limitations as known to the law or the decisions of the courts upon that subject. Limitation, as used in such statutes, means a bar to the alleged right of the plaintiff to recover in the action created by or arising out of the lapse of a certain time after the cause of action accrued, as appointed by law."

Compare:

Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641, 52 L. ed. 1039 (1908);

Roche v. McDonald, 275 U. S. 449, 48 S. Ct. 142, 72 L. ed. 365 (1928);

Milwaukee County v. M. E. White Co., 296 U. S. 268, 277, 56 S. Ct. 229, 234, 80 L. ed. 220, 228 (1935);

Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. ed. 278 (1940);

Lamb v. Powder River Live Stock Co., 132 Fed. 434, 443 (C. C. A. 8th, 1904).

In other words, California cannot, under the guise or pretext of merely affecting remedy or procedure, avoid giving full faith and credit to the assessment at bar levied pursuant to the "public acts" of Ohio.[19]

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[19] *Broderick v. Rosner*, 294 U. S. 629, 643, 55 S. Ct. 589, 592, 79 L. ed. 1100, 1107 (1935);
Titus v. Wallick, 306 U. S. 282, 292, 59 S. Ct. 557, 562, 83 L. ed. 653, 659, 660 (1939);
Roche v. McDonald, 275 U. S. 449, 48 S. Ct. 142, 72 L. ed. 365 (1928).

F. CALIFORNIA'S DISCRIMINATION AS BETWEEN ASSESSMENTS LEVIED UNDER PARALLEL FACTS IN OHIO AND CALIFORNIA ABRIDGES THE PRIVILEGES AND IMMUNITIES GUARANTEED BY ARTICLE IV, SECTION 2, OF THE FEDERAL CONSTITUTION.

It seems clear, as the dissenting justices in the case at bar point out, that:

> "California has no policy necessitating the destruction of the substantive right of the foreign bank depositor to enforce the liability imposed upon the bank's stockholders, and no interest in riding over such rights. In fact, its policy is to impose such liability, for not only does it have a bank act substantially identical with the Ohio statute, but this [California] court has held that the liability under that act is not created until an assessment is made by the superintendent of banks. (*Richardson v. Craig, supra*;[20] see, also, *Johnson v. Greene,* 88 F. 2d 683, reaching the same conclusion regarding the National Bank Act, from which the California and Ohio statutes were copied.)" [R. 67.]

The majority opinion seeks to distinguish between the obligation of Ohio and California bank stockholders by pointing out that "the Ohio courts have denominated the stockholders' liability direct, primary and self-executing, as distinguished from the indirect and secondary stock-

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[20] *Richardson v. Craig* is reported in 11 Cal. (2d) 131, 77 P. (2d) 1077 (1938).

holders' liability involved in . . . California . . ." [R. 63.] The emptiness of such labels is illustrated by comparing:

> *National Bank v. Kennedy*, 17 Wall. 19, 22, 21 L. ed. 554 (1873);
>
> *Baumgardner v. State*, 48 Ohio App. 5, 16-25, 192 N. E. 349, 355-361 (1934); and
>
> *Richardson v. Craig*, 11 Cal. (2d) 131, 77 P. (2d) 1077 (1938).

But the California Supreme Court's supposed distinction between the Ohio and California laws respecting bank stockholders' liability rests ultimately upon the assumption that in Ohio "the creditors could have enforced" the obligation sued upon in the case at bar [R. 60]. There are two sufficient reasons why that claimed distinction can be of no consequence here.

In the first place, as we have seen, Ohio has by statute empowered her superintendent of banks to enforce the stockholder's liability. While in the second place, the cause at bar does not concern what the creditors *might* have done, but only the cause of action which the Ohio Superintendent of Banks has in fact asserted and requested California to enforce. In the words of *McDonald v. Thompson*, 184 U. S. 71, 76, 22 S. Ct. 297, 46 L. ed. 437, 440 (1902):

> ". . . it is . . . sufficient to say of this that the action is not brought by the creditors . . . but by the receiver . . . In such cases no debt becomes due to the receiver as such until a deficiency has been ascertained and an assessment made . . ."

In *Richardson v. Craig,* 11 Cal. (2d) 131, 77 P. (2d) 1077 (1938):

(a) A California bank failed,

(b) The California Superintendent of Banks took possession, made his appraisals, estimated the assets available with which to pay the claims of depositors, and

(c) Demanded that the bank stockholders pay the deficiency on or before a certain date—*i. e.,* levied an assessment.

The majority opinion of the California Supreme Court in the case at bar concedes:

> "In the case of *Richardson v. Craig,* 11 Cal. 2d 131 (77 P. 2d 1077), this court held that the liability under the California Bank Stockholders' Liability Act (Deering's Gen. Laws, Act 652a) was 'created' when the assessment was made." [R. 62.]

In other words, the California Supreme Court holds that under this state of facts the period specified in Section 359 of the California Code of Civil Procedure did not commence to run until the date of levy of the California Superintendent's assessment. To state it differently, California refuses to set in motion its so-called statute of limitations against the California Superintendent of Banks at any time before the happening of the event upon which the California Superintendent's cause of action is predicated.

In the case at bar:

(a) An Ohio bank failed,

(b) The Ohio Superintendent of Banks took possession made his appraisals, estimated the assets available with which to pay claims of depositors, and

(c) Demanded that the bank stockholders pay the deficiency on or before a certain date—*i. e.,* levied an assessment.

The obvious result of the decision in the case at bar is that California grants to her Superintendent of Banks the right to sue upon his assessment in the courts of California, but denies the Ohio Superintendent of Banks an equal right under parallel facts and circumstances.

It is therefore true, as the dissenting justices of the California Supreme Court state:

> "The majority opinion, while conceding the right to maintain actions in the courts of this state to the California superintendent of banks, denies such a right on parallel facts to the Ohio superintendent and thus vitiates the Ohio statutory provisions relating to assessments." [R. 67.]

Such unwarranted discrimination manifestly abridges the privileges and immunities guaranteed by Article IV, Section 2, of the Federal Constitution. As this Court stated in *Ward v. Maryland,* 12 Wall. 418, 430, 20 L. ed. 449, 452 (1871):

> "Attempt will not be made to define the words 'privileges and immunities,' . . . Beyond doubt those words are words of very comprehensive mean-

ing, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union . . . to maintain actions in the courts of the state . . ."

Later, in *Blake v. McClung,* 172 U. S. 239, 252, 19 S. Ct. 165, 43 L. ed. 432, 437 (1898), this Court said:

"In the *Slaughter-House Cases,* 16 Wall. 36, 77 (21: 394, 409), the court . . . said: . . . 'Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.'

"In *Cole v. Cunningham,* 133 U. S. 107, 113, 114 (33: 538, 542), this court cited with approval the language of Justice Story, in his Commentaries on the Constitution, to the effect that the object of the constitutional guaranty was to confer on the citizens of the several states 'a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances, and this includes the right to institute actions.' "

In *Chambers v. Baltimore & O. R. R. Co.,* 207 U. S. 142, 149, 28 S. Ct. 34, 35, 52 L. ed. 143, 146 (1907), this Court declared:

"Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land."

Again, in *Maxwell v. Bugbee*, 250 U. S. 525, 537, 40 S. Ct. 2, 63 L. ed. 1124, 1130 (1919), this Court said that Article IV, Section 2, secures in each state to the citizens of all other states "the right to the usual remedies for the collection of debts . . ."

More recently, in *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U. S. 230, 233, 54 S. Ct. 690, 78 L. ed. 1227, 1229 (1934), the Court observed:

> "The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens. Corfield v. Coryell, 4 Wash. C. C. 371, 381, Fed. Cas. No. 3,230."

In the language of Mr. Justice Roberts in *Hague v. C.I.O.*, 307 U. S. 496, 511, 59 S. Ct. 954, 83 L. ed. 1423, 1434 (1939), "it has come to be the settled view that Article 4, §2, does . . . import . . . that in any state every citizen of any other state is to have the same privileges and immunities which the citizens of that state enjoy. The section, in effect, prevents a state from discriminating against citizens of other states in favor of its own."

Thus, the California Supreme Court in discriminating against the Ohio assessment, "attempted to achieve a result that the Constitution of the United States forbade."[21]

The abridgement of the petitioner's privileges and immunities inevitably followed the California Supreme Court's refusal to give full faith and credit to the peti-

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[21] *Kenney v. Loyal Order of Moose*, 252 U. S. 411, 415, 40 S. Ct. 371, 372, 64 L. ed. 638, 641 (1920).

tioner's assessment based upon the "public acts" of Ohio. As this Court said in *Pink v. A. A. A. Highway Express, Inc.*, 314 U. S. 201, 62 S. Ct. 241, 86 L. ed. (Adv. Ops.) 200, 204 (1941):

> "It was the purpose of that provision to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others."

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, in order that the rights guaranteed to the petitioner by Sections 1 and 2 of Article IV of the Constitution of the United States be recognized and accorded to the petitioner, and that to such an end a writ of certiorari should be granted and this Honorable Court should review the decision of the Supreme Court of the State of California and finally reverse it.

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 603

STATE OF OHIO, on the relation of S. H. SQUIRE, Superintendent of Banks in Charge of the Liquidation of The Union Trust Company of Cleveland, Ohio,

Petitioner,

vs.

CLARENCE H. PORTER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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CLARENCE H. PORTER,

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

A. Factual Element.

The factual aspects of this case were presented to the California courts by way of an agreed statement [R. 20 to 34]. Concisely and chronologically stated, the material facts are as follows:

On February 27, 1933, The Union Trust Company of Cleveland, Ohio, failed, being on that date in an insolvent condition [R. 23]. Respondent Porter, a resident of California, was a stockholder in said banking corporation [R. 27].

On June 15, 1933, the Superintendent of Banks of Ohio took possession of said corporation and its assets for the purpose of commencing liquidation proceedings [R. 24].

On July 30, 1934, said Superintendent of Banks announced his findings as to the extent of the bank's insolvency and the fact that he was levying an assessment of one hundred per cent. upon the stockholders [R. 25, 34].

On May 29, 1936, action was commenced in the Superior Court of the State of California, in and for the county of Los Angeles, to enforce, as against respondent, the stockholder's liability created by Article XIII, Section 3, of the Constitution of the state of Ohio [R. 28]. In other words, the action was commenced more than three years after the failure of the bank, but less than three years after the Superintendent of Banks announced the levy of an assessment.

B. The Issues of Law.

Respondent interposed a plea that the action was barred by the applicable California statute of limitations.[1] That statute is quoted by petitioner at page 6 of the petition herein. Omitting inapplicable language, it reads as follows:

> "* * * Actions against * * * stockholders of a corporation * * * to enforce liability created by law * * * must be brought within three years after * * * liability was created."

---

[1]Code of Civil Procedure of the State of California (1872), p. 93, Sec. 359;
Deering (1941), p. 152, Sec. 359.

As indicated by the language of the statute, and as settled by a long line of California decisions,[2] the starting point for the running of this statute is the date of the creation of the substantive liability.

Therefore, in determining the tenability of respondent's plea, the problem of the California courts was to determine the date when the Ohio substantive liability was created.

Petitioner and respondent, as well as the trial court, the intermediate appellate court and the Supreme Court of California, were in agreement that the question as to the time of the creation of this particular liability was referable to the law of Ohio. Although the fundamental rule is recognized that statutes of limitation are remedial, so that the law of the forum governs their application, the California courts have consistently held that the law of the corporate domicile determines the nature, the time and the mode of creation of a stockholder's liability. Up to this point the parties were in agreement, but here the divergence of contentions began.

Petitioner argued that the "assessment" was the basis of his action; that to hold that the California statute began to run prior to the levy of the assessment was to

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[2]*Hunt v. Ward*, 99 Cal. 612; 34 Pac. 335 (1893);
Gardiner v. Royer, 167 Cal. 238; 139 Pac. 75 (1914);
Miller v. Lane, 160 Cal. 90; 116 Pac. 58 (1911);
Royal Trust Co. v. MacBean, 168 Cal. 642; 144 Pac. 139 (1914);
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Hospelhorn v. Newhoff, 43 Cal. App. (2d) 678; 111 Pac. (2d) 688 (1941).

"go behind" the assessment and to deny it the full faith and credit to which it was entitled as a "public act" of Ohio.

Respondent has contended, and now contends, that the liability here involved matured and became fixed upon the date when the bank failed, and this by operation of the self-executing provision of the Ohio Constitution; that the assessment was purely a *procedural* step, having nothing to do with the creation of the *substantive* rights and correlative liabilities; that the Ohio liability was direct and primary and became enforceable by the bank's creditors upon the bank's failure; that the assessment was entitled to be given in California no greater effect than it was given by the decisions of the Ohio courts; and that a statute of limitations is not unconstitutional merely because its running does not await the taking of non-substantive or procedural steps by an administrative official having, under some circumstances, the exclusive power of enforcement.

As indicated by the record, respondent's position was sustained by the intermediate appellate court and by the Supreme Court of California.

II.

JURISDICTIONAL STATEMENT.

No Reviewable Federal Question Is Here Presented for the Reason That the Matter Involved Is Solely One of Statutory Construction; the Validity of Pertinent Ohio Statutes Has Not Been Challenged.

In *Glenn v. Garth*, 147 U. S. 360, 13 Sup. Ct. 350, 37 L. Ed. 203 (1892), an action was commenced in New York seeking recovery of the amount of two assessments made by the courts of the state of Virginia against the stockholders of a certain Virginia corporation. The liability of the defendants depended upon a construction of Virginia statutes. The New York courts decided in favor of the defendants, and the plaintiff sued out a writ of error in this court. In dismissing the writ for want of jurisdiction, the court said:

> "If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

Moreover, to paraphrase and apply to the instant case the language of this court in the concluding paragraph of the decision in *Glenn v. Garth:*

> "This record may be searched in vain for any proof that, as a matter of fact, the public acts of

Ohio (Virginia) had by law or usage in Ohio (Virginia), any other effect than was given them in California (New York)."

In *Lloyd v. Matthews,* 155 U. S. 222, 15 Sup. Ct. 70, 30 L. Ed. 128 (1894), a writ of error was likewise dismissed for want of jurisdiction with the observation, applicable to the instant case, that "this record contains nothing to show, as a matter of fact, that the public acts of Ohio had by law or usage in Ohio any other effect than was given them by the Court of Appeals of Kentucky."

It is apparent from the record in this case that the Supreme Court of California was careful to follow, and correctly followed, the decisions of the Supreme Court of Ohio in determining the proper construction of Ohio statutes and the effect of the statutory assessment; but even if the California court had erred in construing the Ohio statutes, no reviewable federal question would have been presented.

Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U. S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610;

Banholzer v. New York Life Ins. Co., 178 U. S. 402, 20 Sup. Ct. 972, 44 L. Ed. 1124.

III.

SUMMARY OF ARGUMENT.

A. The law of the forum (California) governs with respect to the meaning, effect and application of the statute of limitations.

B. The law of the corporate domicile (Ohio) determines the nature of the substantive liability, the conditions essential to its creation and the legal effect of the administrative assessment.

C. The decisions of the highest court of Ohio are controlling with reference to the interpretation and the effect of Ohio statutes and constitutional provisions.

D. The full faith and credit clause of the federal constitution requires that the public acts of Ohio be given, in California, the same (not greater) effect that they are given in Ohio.

E. In Ohio the administrative assessment was given the effect of a mere procedural step, not a condition precedent to the existence of the substantive liability which became fixed and enforceable immediately upon the failure of the bank.

F. The California Supreme Court, in the light of an examination of Ohio decisions, gave to the administrative assessment precisely the same dignity, force and effect that it was accorded by the Supreme Court of Ohio, namely, that of a procedural step, not essential to the existence of the direct and primary liability which was created by the self-executing provisions of the Ohio Constitution.

G. The fact that the California statute of limitations began to run upon the failure of the bank (that being the event which, under Ohio law, created the substantive liability) achieved no unconstitutional result, notwithstanding that the subsequent making of an assessment may have been one of the administrative or procedural steps necessary to be taken by the Superintendent of Banks in order to perfect his right to sue.

H. The California statute of limitations, as applied to the instant case, did not, either in theory or in fact, operate to deny the Ohio Superintendent of Banks a reasonable opportunity to enforce the Ohio liability in the state of California.

I. Since the California statute of limitations has always been applied, uniformly and consistently, to actions upon liabilities created by law, irrespective of the state or country of origin, the present application of the statute involves no violation of the privileges and immunities clause of the federal constitution.

J. The case presented is not one involving a matter of such public or general importance as to warrant granting the discretionary writ, particularly in view of the fact that in November, 1936, the provisions of the Ohio Constitution, under which the present case arose, were repealed, the repeal being effective on July 1, 1937.

IV.

ARGUMENT.

A. The Law of the Forum (California) Governs With Respect to the Meaning, Effect and Application of the Statute of Limitations.

It is an elementary proposition that the application of the statute of limitations is purely a matter of local law with respect to which the law of the forum is controlling, irrespective of the place of origin of the substantive right sought to be enforced.

Platt v. Wilmot, 193 U. S. 602, 24 Sup. Ct. 542, 48 L. Ed. 809;

Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986;

McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177.

B. The Law of the Corporate Domicile (Ohio) Determines the Nature of the Substantive Liability, the Conditions Essential to Its Creation and the Legal Effect of the Administrative Assessment.

There can be no question but that "the nature, the extent, and the conditions of the liability of a stockholder * * * depend primarily upon the laws of the state or country by which the corporation was created." It was so held by this court in *Harrigan v. Bergdoll,* 270 U. S. 560, 46 Sup. Ct. 413, 70 L. Ed. 733, involving facts closely analogous to those of the instant case. In *Harrigan v. Bergdoll* the Pennsylvania courts had held that the action to enforce a stockholder's liability was barred by the statute of limitations, notwithstanding that the action

had been commenced within less than the statutory period following the levy of an assessment. In that case, as in this, the plaintiff complained that the Pennsylvania courts had failed to give proper effect to the assessment.

This court sustained the judgment of the Pennsylvania courts, pointing out that under the law of the state wherein the corporation was created "the liability became absolute without an assessment," and "that the order of assessment and levy is a purely administrative proceeding preliminary to the institution of a suit." It was further pointed out that it had long been settled by the decisions of the Supreme Court of Pennsylvania that the applicable statute of limitations began to run against the enforcement of the stockholder's liability from the time that the insolvency of the corporation became apparent.

It is manifest that in the instant case the Supreme Court of California gave full recognition to these settled principles of law. This is indicated by the following language of the California court: "To determine when the liability was created the full faith and credit clause of the United States Constitution (Art. IV, Sec. 1) requires recourse to the applicable constitutional provisions, statutes and decisions of Ohio (*Converse v. Hamilton*, 224 U. S. 234, 32 Sup. Ct. 415, 56 L. Ed. 749)." This recognition is further manifested by the Ohio decisions which are cited and discussed in the decision of the Supreme Court of California.

C. The Decisions of the Highest Court of Ohio Are Controlling With Reference to the Interpretation and the Effect of Ohio Statutes and Constitutional Provisions.

Petitioner lays the foundation for a fallacious argument by emphasizing a similarity in the language patterns of the National Bank Act and of the Ohio banking statutes. Solely on the basis of this similarity petitioner seeks to obtain acceptance of a conclusion which clearly is a *non-sequitur:* That the legal effect of an assessment levied by the Ohio Superintendent of Banks pursuant to the authority of Ohio statutes is necessarily the same as that of an assessment levied by the Comptroller of the Currency under the authority of the National Bank Act. For at least two reasons petitioner's conclusion is entirely erroneous:

(1) It takes no account of vital and fundamental differences arising from the fact that the Ohio liability here involved was created by a self-executing provision of the Ohio Constitution; and

(2) It disregards the controlling character of Ohio interpretive decisions holding that the Ohio liability arising under the constitutional provision was direct and primary; that the Ohio statutes enacted in aid of the constitutional provision were purely procedural and that the constitutional liability matured and became fixed upon the failure of the bank, independent of any procedural steps that might ensue in the course of its enforcement.

In short, petitioner attempts, by the method indicated, to clothe the Ohio assessment with attributes which it does not possess and to give it a force and effect which the Ohio decisions definitely show that it never possessed. Respondent urges that the Ohio constitutional provision, the Ohio statutes and the assessment levied pursuant thereto are entitled, respectively, to the effect which the Supreme Court of Ohio has accorded to them, neither more nor less.

D. The Full Faith and Credit Clause of the Federal Constitution Requires That the Public Acts of Ohio be Given, in California, the Same (Not Greater) Effect That They Are Given in Ohio.

Under our next succeeding point heading we shall refer to certain Ohio decisions for the purpose of showing the force and effect accorded to the statutory assessment in the state of Ohio. It will readily appear from this examination that the assessment was a mere *procedural* step, and not a prerequisite to the existence of the substantive liability. It is evident, therefore, that petitioner seeks to give to the assessment greater force and effect than is accorded to it in the state of Ohio. The full faith and credit clause of the federal constitution would, in truth, be violated if petitioner's position were sustained.

As stated in *State of Ohio v. Chattanooga, etc., Co.*, 289 U. S. 439, 53 Sup. Ct. 663, 77 L. Ed. 1307, "the full faith and credit clause does not require that greater effect be given the Tennessee (Ohio) statute elsewhere than is given in the courts of that state."

One of the decisions cited in support of the foregoing statement is *Robertson v. Pickrell,* 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049, wherein the following language is found:

> "The Act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States, does not require that they shall have any greater force and efficacy in other courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle and, as we said on a former occasion, would contravene the policy of the provisions of the Constitution and laws of the United States on that subject. *Board of Public Works v. Columbia Coll.,* 17 Wall. 529."

The decisions in *Great Western Telegraph Co. v. Purdy,* 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986, hereinafter discussed, and in *Harrigan v. Bergdoll,* 270 U. S. 560, 46 Sup. Ct. 413, 70 L. Ed. 733, discussed *supra,* illustrate the vital difference between assessments which create the *substantive* right and assessments which are merely *procedural.* These two decisions also furnish illustrations of limitation statutes which commenced to run prior to the levy of procedural assessments.

E. In Ohio the Administrative Assessment Was Given the Effect of a Mere Procedural Step, Not a Condition Precedent to the Existence of the Substantive Liability Which Became Fixed and Enforceable Immediately Upon the Failure of the Bank.

The Ohio banking statutes, subordinate to the constitutional provision, and all acts of the Superintendent of Banks by authority of such statutes were purely procedural or administrative and wholly incompetent to create or modify the substantive liability of the stockholders or the correlative rights of the creditors of the bank.

Snider v. United Banking and Trust Co., 124 Ohio St. 375, 178 N. E. 840;

Squire v. Solinski 132 Ohio St. 180, 5 N. E. (2d) 479.

The Ohio substantive liability, created solely by operation of the self-executing constitutional provision, was a direct and primary liability which became enforceable by the bank's creditors immediately upon the failure of the bank.

Snider v. United Banking & Trust Co., supra;

Squire v. Solinski, supra;

State v. Bremer, 130 Ohio St. 227, 198 N. E. 874;

Squire v. Standen, 135 Ohio St. 1, 18 N. E. (2d) 608;

Andrews v. State, 124 Ohio St. 348, 178 N. E. 581;

State v. Coburn, 133 Ohio St. 192, 12 N. E. (2d) 471.

As representative of the creditors, the Superintendent of Banks acquired the right to enforce the constitutional

liability only upon his taking possession of the bank for purposes of liquidation. Prior to that time the right of action resided in the creditors.

Fulton v. Wetzel, 47 Ohio App. 72, 190 N. E. 776;

Snider v. United Banking & Trust Co., supra;

Feldman v. Standard Trust Bank of Cleveland, 46 Ohio App. 67, 187 N. E. 743.

In a decision by an Ohio court involving the same bank and the same liability which are involved in the instant case, the following language may be found (*Squire v. Abbott*, 8 Ohio Opinions 134):

> " 'The liability imposed by Section 3, Article XIII of the Ohio Constitution is not a secondary one but a primary one. Upon the insolvency of the bank the obligation is immediately enforceable before the assets of the bank have been liquidated, and it is unnecessary for the Court to determine whether the assets of the bank are sufficient to pay its liabilities.' "
>
> * * * * * * * *
>
> "It follows then that when the bank fails to meet its obligations in the regular course of business the obligations of a stockholder to the depositor and creditor become defined and fixed."

In *Squire v. Solinski, supra*, the Ohio court stated that the Ohio banking statutes "are regulatory and procedural, and neither augment nor diminish the constitutional rights of creditors."

In *State v. Bremer, supra*, the Supreme Court of Ohio said:

> "The superadded liability is created by constitutional mandate. * * *

> "This court held in the case of Snider v. United Banking and Trust Co., 124 Ohio St. 375, 178 N. E. 840, an action to enforce the superadded liability, that the provisions of the section herein involved, in so far as the authority and duty of the Superintendent of Banks with relation to insolvent banks were concerned, were regulatory and procedural."

In *Snider v. United Banking & Trust Co., supra,* the Ohio Supreme Court stated:

> "The provisions of the banking code are procedural, not substantive, in nature. They create no rights in favor of either the corporation, its stockholders or creditors. It is the purpose of that code to regulate merely."

F. The California Supreme Court, in the Light of an Examination of Ohio Decisions, Gave to the Administrative Assessment Precisely the Same Dignity, Force and Effect That It Was Accorded by the Supreme Court of Ohio, Namely, That of a Procedural Step, Not Essential to the Existence of the Direct and Primary Liability Which Was Created by the Self-executing Provisions of the Ohio Constitution.

Reference to the decision of the California Supreme Court in this case readily discloses that in determining the legal effect of the assessment, the Ohio decisions were faithfully followed. The fact that under the Ohio constitutional provision the liability became definite, fixed and enforceable immediately upon the failure of the bank is beyond reasonable doubt or controversy. The fact that the levy of an assessment by the Ohio Superintendent of Banks is a mere *procedural* step, having nothing to do with the creation of the substantive liability, is equally clear.

G. The Fact That the California Statute of Limitations Began to Run Upon the Failure of the Bank (That Being the Event Which, Under Ohio Law, Created the Substantive Liability) Achieved No Unconstitutional Result, Notwithstanding That the Subsequent Making of an Assessment May Have Been One of the Administrative or Procedural Steps Necessary to be Taken by the Superintendent of Banks in Order to Perfect His Right to Sue.

The truth of the foregoing proposition is conclusively demonstrated by the decisions of this court in *Great Western Telegraph Co. v. Purdy,* 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986, and in *Harrigan v. Bergdoll,* 270 U. S. 560, 46 Sup. Ct. 413, 70 L. Ed. 733. The latter decision we have discussed above.

The question presented in *Great Western Telegraph Co. v. Purdy* was whether or not the Iowa courts had accorded full faith and credit to an assessment levied against a stockholder of an Illinois corporation by the judgment of an Illinois court. In that case, as in the case at bar, the courts of Iowa held that the action to enforce the liability was barred by the applicable Iowa statute of limitations. In that case, as in the case at bar, the applicable statute began to run prior to the levy of the assessment.

This court held that the courts of Iowa in thus applying the Iowa statute of limitations did not deny full faith and credit to the Illinois assessment, the language of this court being as follows:

> "The whole effect of the order of assessment being to fix the amount which any stockholder liable under his contract of subscription should pay, and to author-

> ize the receiver to bring suits against stockholders for the same, but not to determine whether the present defendant, or any other particular stockholder, was liable for anything, the Iowa court, by sustaining the defense of the statute of limitations, did not deny to the judicial proceedings of Illinois the full faith and credit to which it was entitled."

Reference to the decision of the Supreme Court of California in the case at bar discloses that the same force and effect was accorded the Ohio assessment. After referring to the Ohio decisions, the California court said:

> "In those cases the courts of Ohio recognized that the liability which was enforced by an assessment was the direct and primary stockholder's liability, even though the necessity therefor and the amount thereof be determined exclusively and finally by the fact and the amount of the assessment."

As we have already pointed out, the decision of this court in *Harrigan v. Bergdoll,* 270 U. S. 560, 46 Sup. Ct. 413, 70 L. Ed. 733, demonstrates the valid distinction to be drawn between assessments which are mere procedural prerequisites and assessments which create the substantive right. That decision demonstrates the fallacy of the contention in this case that the action "is based upon the assessment." The decision also clearly shows that a statute of limitations which commences to run against a stockholder's liability from the date of the insolvency of the corporation is not unconstitutional in its operation merely because the subsequent levy of an assessment may be a necessary procedural step in order to perfect the right of an administrative official to bring an action to enforce the liability.

Limitation statutes which begin to run against actions for the enforcement of stockholders' liabilities from the date of the insolvency of the corporation are not unusual.[3] In *Moran v. Cobb,* 120 Fed. (2d) 16 (1941), the United States Court of Appeals for the District of Columbia was called upon to consider the application of an Arizona statute of limitations which was held to have begun its running from the date of the closing of the bank involved. In the opinion, as prepared by Associate Justice Miller, it is recognized that a subsequent determination of insolvency remained "an essential condition of suit," and that, as a practical matter, the application of the statute required that such determination be completed and that the suit be filed within three years from the date of the failure of the bank. It was held however, that the existence of such procedural requirement did not affect the validity of the statute of limitations.

H. The California Statute of Limitations, as Applied to the Instant Case, Did Not, Either in Theory or in Fact, Operate to Deny the Ohio Superintendent of Banks a Reasonable Opportunity to Enforce the Ohio Liability in the State of California.

Petitioner relies upon the decision in *Broderick v. Rosner,* 294 U. S. 629, 55 Sup. Ct. 589, 79 L. Ed. 1100, asserting that the California statute of limitations, in its application here, is similar to the New Jersey statute under consideration in the cited case. Brief analysis will suffice to show that the decision is not in point and that the

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[3]See Annotation: "When Limitation Begins to Run Against Action to Enforce Stockholder's Superadded Liability," 137 A. L. R. 788.

statute challenged in *Broderick v. Rosner* bears no resemblance whatever to the California statute of limitations, either in nature or in effect.

The New Jersey statute involved in *Broderick v. Rosner* was not a statute of limitations. It is true that said statute purported to affect only the *remedy* for the enforcement, as against New Jersey residents, of stockholders' liabilities created by the laws of other jurisdictions. However, it was perfectly clear that the purpose, and the necessary effect, of that statute was absolutely to prevent the enforcement of such liabilities in New Jersey. This unconstitutional purpose was sought to be accomplished by imposing procedural requirements which could not possibly be fulfilled.

The California statute here involved is a true statute of limitations. Neither in fact nor in theory did the California statute operate to deny, or unreasonably to restrict access to the California courts for the enforcement of the Ohio liability.

According to the decision of the Supreme Court of California, the California statute commenced to run as against this liability on February 27, 1933, that being the date of the failure of the bank and the time when a cause of action accrued to the creditors upon the constitutional liability. The Superintendent of Banks took possession for the purpose of commencing liquidation on June 15, 1933, and thereby became a statutory trustee for the creditors in proceedings for the enforcement of the liability on their behalf. Thus, it is apparent that the operation of the California statute allowed the creditors of the bank three years from the accrual of their cause of action, and it allowed the Superintendent, their trustee, a period

of two years and eight months from the time he took possession of the bank for liquidation purposes within which to sue in California.

It is a stipulated fact in this case that the Ohio Superintendent of Banks levied the assessment on July 30, 1934. Accordingly, on the date of the levy of the assessment there yet remained a period of one year and seven months within which the Superintendent of Banks of Ohio could have commenced the action in California.

In applying the California statute in the present case, the Supreme Court of California held that the substantive right was "created" within the meaning of the statute at the same time that a cause of action accrued to the creditors of the bank under Ohio law, *i. e.*, upon the failure of the bank. Therefore, in relation to the instant case, the fact that the California statute runs from the creation of the substantive right, rather than from the time a cause of action accrues thereon, is without significance. The right was created and a cause of action accrued to the creditors at the same time and upon the occurrence of the same event.

In the face of these undeniable facts, it is futile for petitioner to contend that the California statute of limitations, as applied to this case, operated to deny, or unreasonably to restrict, the California remedy. Applicable here is the established principle that the constitutionality of statutes is not determined in the abstract, but only in relation to the facts of the particular case in which the statute is challenged.

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 Sup. Ct. 106, 66 L. ed. 239.

I. Since the California Statute of Limitations Has Always Been Applied, Uniformly and Consistently, to Actions Upon Liabilities Created by Law, Irrespective of the State or Country or Origin, the Present Application of the Statute Involves No Violation of the Privileges and Immunities Clause of the Federal Constitution.

Petitioner's contention that the decision in the instant case so operates as to constitute a violation of the privileges and immunities clause of the federal constitution appears to be without substance. As the Supreme Court of California correctly said:

> "To give proper effect to the Ohio law in this case obviously is not a violation of the privileges and immunities clause of the United States Constitution. The time limitation of said section 359 is applied uniformly to compute the applicable period of limitation for the commencement of the action from the time the liability was created."

The record here fails to show that the applicable California statute of limitations is not uniformly applied. In truth, this statute has always been applied by the California courts with uniformity and consistency.[4]

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[4]Cases cited Note 2, *supra*.

J. The Case Presented Is Not One Involving a Matter of Such Public or General Importance as to Warrant Granting the Discretionary Writ, Particularly in View of the Fact That in November, 1936, the Provisions of the Ohio Constitution, Under Which the Present Case Arose, Were Repealed, the Repeal Being Effective on July 1, 1937.

In view of the repeal[5] of the Ohio constiutional provision giving rise to the liability here involved, it is apparent that the cause is not one of great public or general importance.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387, 43 Sup. Ct. 422, 67 L. ed. 712.

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[5]Volume 11, Page's Ohio General Code Annotated, Part Two, page 299 (Constitution).

Conclusion.

It is submitted, therefore, that petitioner has failed to present any substantial federal question. In its decision of this case, the Supreme Court of California has given to Ohio constitutional and statutory provisions the same interpretations and the same effect that they have been given by the highest court of the state of Ohio. In other words, the public acts of Ohio were given the fullest faith and credit. No question is presented which merits the further consideration of this Honorable Court.

Respectfully submitted,

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FEB 23 1943
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IN THE

Supreme Court of the United States

October Term, 1942.

No. 603.

STATE OF OHIO, on the relation of S. H. SQUIRE, Superintendent of Banks in Charge of the Liquidation of The Union Trust Company of Cleveland, Ohio,

Petitioner,

vs.

CLARENCE H. PORTER,

Respondent.

PETITION FOR REHEARING.

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Petitioner,

vs.

CLARENCE H. PORTER,

Respondent.

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the Superintendent of Banks of the State of Ohio and presents this application for a rehearing of his petition for certiorari in this cause:

I.

Jurisdiction.

The petition for certiorari was filed on December 29, 1942; and was denied on February 1, 1943. This petition is filed within less than twenty-five days thereafter, under Rule 33.

II.

Grounds for Rehearing.

This petition for a rehearing should be granted for the following reasons:

First—Undeniably, this cause involves "a federal question of substance."

It was never assumed that the importance of the case here would be measured by such questions as the interim repeal of bank stockholders' liability statutes, both state and federal, or the social and economic considerations favoring or opposing super-added liability of stockholders.

Nor is it an important federal question whether the Ohio Superintendent of Banks is to receive the sums sued for.

Rather, the "federal question of substance" presented here is whether or not the courts of California may, with impunity, deny full faith and credit to the public acts of a sister state. It is this question which invokes the sound judicial discretion of this Honorable Court to review the case at bar on writ of certiorari.

Although California enforces the assessments of her own Superintendent of Banks [See: *Richardson v. Craig*, 11 Cal. (2d) 131, 77 P. (2d) 1077 (1938)], she persistently refuses to enforce like assessments coming from other states.

By the convenient device of construing the anomalous provisions of Section 359 of her Code of Civil Procedure so as to fit the necessities of each case, California contrives to evade enforcement of such assessments—regardless of the state of origin. As the dissenting justices of the California Supreme Court point out, "the application

of that section to a stockholders' liability created under the laws of another state raises major issues that have been disregarded in the present case as in those that preceded it." [R. 65.]

See:

[Colorado] *Miller v. Lane,* 160 Cal. 90, 116 P. 58 (1911);

[Indiana] *State of Indiana v. Hoffman,* 53 Cal. App. (2d) 796, 128 P. (2d) 162 (Hearing denied by Cal. Sup. Ct., (1942);

[Iowa] *Bates v. Blake,* 103 Cal. App. Dec. 26, 105 P. (2d) 940 (1940) (this decision, which *gave* full faith and credit to an Iowa assessment, was vacated by the Cal. Sup. Ct., 100 Cal. Dec. 545 (i), Nov. 19, 1940);

[Maryland] *Hospelhorn v. Newhoff,* 43 Cal. App. (2d) 678, 111 P. (2d) 688 (Hearing denied by Cal. Sup. Ct., 1941);

[Maryland] *Hospelhorn v. Van Dusen,* 40 Cal. App. (2d) 257, 104 P. (2d) 888 (Hearing denied by Cal. Sup. Ct., 1940);

[Ohio] *State of Ohio v. Porter,* 21 Adv. Cal. 46, 129 P. (2d) 691 (1942);

[Ohio] *Squire v. Merriam,* 21 Adv. Cal. 59, 129 P. (2d) 698 (1942).

This cumulative record of California's denial of full faith and credit to the public acts of sister states cannot be passed off as "mere misconstructions" of the laws of

such states. The evidence is overwhelming against California.

Moreover, the same specious suggestion as to "mere misconstructions" has been rejected by this Court in every case in the line from *Converse v. Hamilton*, 224 U. S. 243, 32 S. Ct. 415, 56 L. ed. 749 (1912) to *Chandler v. Peketz*, 297 U. S. 609, 56 S. Ct. 602, 80 L. ed. 881 (1936).

And see:

> Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws (1926), 39 Harv. L. Rev. 533, 550.

The constitutional command of the full faith and credit clause must be observed; and this Court, *itself*, will examine the laws of Ohio in order to assure that observance.

> *Titus v. Wallick*, 306 U. S. 282, 59 S. Ct. 557, 83 L. ed. 653 (1939);
>
> *Adam v. Saenger*, 303 U. S. 59, 58 S. Ct. 454, 82 L. ed. 649 (1938).

On re-examination of the petition for certiorari and the supporting brief at bar, it appears that it was tacitly assumed, rather than expressly demonstrated, that the fundamental federal issue here is clearly this:

The full faith and credit clause (U. S. Const., Art. IV, §1) *requires California to recognize and enforce the Ohio assessment. That being true, the judgment must be reversed.* For it is admitted on all sides that if the Constitution compels California to entertain the suit as one *upon the Ohio assessment*, then the petitioner must prevail [R. 61, 62, 67].

Perhaps this basic truism has been overlooked because of the volume of talk about a "statute of limitations" in the case at bar. *If, as seems clear, California is required to admit the Ohio Superintendent of Banks to her courts for the purpose of suit upon the assessment, there can be no statute of limitations problem here.* For it follows as day the night that no California statute of limitations has run against the ***assessment.***

Hence the judgment in this cause must hinge entirely upon the federal question of whether the full faith and credit clause compels California to enforce the Ohio assessment and recognize it as the basis of the cause of action vested in the Ohio Superintendent of Banks.

That is the clear-cut constitutional issue here.

Prevention of state court disregard for the full faith and credit clause is an essential function of this Court in the preservation of the federal system. As Mr. Justice Holmes said:

> ". . . I am unable to reconcile with the requirements of the Constitution, article 4, §1, the notion of a judgment being valid and binding in the state where it is rendered, and yet depending for recognition to the same extent in other states of the Union upon the comity of those states. No doubt some color for such a motion may be found in state decisions. *State courts do not always have the Constitution of the United States vividly present in their minds. . . . But there is no exception in the words of the Constitution.*" (Italics added.)
>
> —Dissenting opinion in *Haddock v. Haddock*, 201 U. S. 562, 632, 633, 26 S. Ct. 525, 50 L. ed. 867, 895, 896 (1906).

In the words of Mr. Justice Brandeis in *Broderick v. Rosner*, 294 U. S. 629, 643, 55 S. Ct. 589, 79 L. ed. 1100, 1107 (1935):

> "A State may adopt such system of courts and form of remedy as it sees fit. . . . But it may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties. Christmas v. Russell, 5 Wall. 290, 300, 18 L. ed. 475, 478."

Second—Considering "the nature of the Union,"[1] it is an especial function of this Court to correct and reprove flouting of the full faith and credit clause.

The full faith and credit clause guarantees the unimpaired continuance of the federal system by the exertion of constitutional compulsion upon state courts. The state court itself cannot act as referee. Of necessity, then, when the issue of full faith and credit is in the balance, "this Court is the final arbiter."

> *Williams v. North Carolina*, 87 L. ed. (Adv. Ops.) 189, 197 (Dec. 21, 1942);
>
> *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 274, 56 S. Ct. 229, 80 L. ed. 220, 226 (1935).

Manifestly, this must be so whether the case from the state court involves a small sum, or many thousands as in this series of litigation. [*Cohens v. Virginia*, 6 Wheat. 264, 5 L. ed. 257, 286 (1821).] It is the vital "federal

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[1]Madison, Journal of Constitutional Convention (1893), 460, 625.

clause" which is subjected to challenge. It is the federal system established by the Constitution which is being tested.

There is thus presented an important question of constitutional law sustaining the issuance of a writ of certiorari to the California Supreme Court. [*Adam v. Saenger*, 303 U. S. 59, 58 S. Ct. 454, 82 L. ed. 649 (1938).] The vitality of the constitutional requirement of full faith and credit is at stake. For, as Mr. Chief Justice Stone says:

> "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore *obligations created under the laws* or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." (Italics added.)
>
> *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 276-277, 56 S. Ct. 229, 80 L. ed. 220, 228 (1935).

And the preservation of the force and effect of the clause rests with this Court in its function as "final arbiter." The issue here is genuinely constitutional.

Third—Rooted in the full faith and credit clause is the guaranty that obligations arising by virtue of the public acts of another state of the union will be recognized and enforced in the state of the forum.

The abridgment of this guaranty by any state gives rise to a constitutional question of *nation-wide importance* challenging the operation of the federal system, *regardless*

of the particular right involved, regardless of who the particular litigants may be, regardless of the amount in controversy.

The organic significance of the full faith and credit question transcends the immediate importance of the particular lawsuit.

> *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U. S. 178, 57 S. Ct. 129, 81 L. ed. 106 (1936);
>
> *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 56 S. Ct. 229, 80 L. ed. 220 (1935).

And the importance of the federal question at bar is not lessened one whit by the circumstance that the provisions for double liability of Ohio bank stockholders were repealed as of July 1, 1937. [Ohio Const., Art. XIII, §3, as amended Nov. 3, 1936.] Within scarcely more than a year this Court has twice reviewed by certiorari similar questions respecting the double liability of national bank stockholders.

> *Fisher v. Whiton*, 87 L. ed. (Adv. Ops.) 167 (Dec. 7, 1942);
>
> *Rawlings v. Ray*, 312 U. S. 96, 61 S. Ct. 473, 85 L. ed. 605 (1941).

In *Fisher v. Whiton*, 87 L. ed. (Adv. Ops.) 167, 168 (Dec. 7, 1942), this Court pointed out:

> "The importance of the question in administration of insolvent national banks . . . caused us to grant certiorari."

Appended to the foregoing is footnote "5", which explains:

> "The double liability feature of national bank stock has been eliminated, but this does not apply

to banks in difficulty prior to July 1, 1937, except as to stock issued after June 16, 1933. 12 USCA §64(a)."

By the same token, the fact that the double liability feature of Ohio bank stock "has been eliminated," does not detract from the importance of the constitutional question here. As this Court said in *Broderick v. Rosner*, 294 U. S. 629, 643, 644, 55 S. Ct. 589, 79 L. ed. 1100, 1107, 1108 (1935):

> "Here the nature of the cause of action brings it within the scope of the full faith and credit clause.
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> * * * * * * * *
>
> *"The fact that the assessment here in question was made under statutory direction by an administrative officer does not preclude the application of the full faith and credit clause . . . because statutes are 'public acts' within the meaning of the clause."* (Italics added.)

Obviously, Section 359 of California's Code of Civil Procedure cannot preclude the suit at bar—any more than Section 94(b) of New Jersey's Corporation Act could preclude the suit in *Broderick v. Rosner*,[2] or Section 8604 of Tennessee's Code the suit in *Fisher v. Whiton*.[3]

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[2]294 U. S. 629, 643, 644, 55 S. Ct. 589, 79 L. ed. 1100, 1107, 1108, (1935).

[3]87 L. ed. (Adv. Ops.) 167 (Dec. 7, 1942).

Fourth—The judgment of the California Supreme Court is in direct conflict with the settled constitutional law that a refusal to recognize and enforce the Ohio assessment of liability against stockholders is a denial of full faith and credit to the public acts of a sister state.

Chandler v. Peketz, 297 U. S. 609, 56 S. Ct. 602, 80 L. ed. 881 (1936);

Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589, 79 L. ed. 1100 (1935);

Converse v. Hamilton, 224 U. S. 243, 32 S. Ct. 415, 56 L. ed. 749 (1912).

Here is an Ohio assessment, protected by the Constitution of the United States, awaiting enforcement in California. So fundamental is the constitutional mandate that this Court not long ago reversed the Supreme Court of Colorado in a *per curiam* opinion on certiorari and ordered enforcement of a Minnesota assessment forthwith.

See:

Chandler v. Peketz, 297 U. S. 609, 56 S. Ct. 602, 80 L. ed. 881 (1936).

If the full faith and credit cases going before have any force, it is that the Supreme Court of the United States should and will assume jurisdiction over this cause, reverse the judgment of the California Supreme Court, and direct enforcement of the Ohio assessment because of the constitutional mandate of the full faith and credit clause. The Constitution of the United States commands California to enforce the Ohio assessment, and it but remains for this command to be given effect here.

If the case at bar involved a national bank assessment sought to be enforced in the courts of California, this

Court unquestionably would review California's grotesque application of Section 359 of her Code of Civil Procedure. In such a case, this Court would feel compelled to act in performance of its duty to protect and preserve a federal institution.

See:

Rankin v. Barton, 199 U. S. 228, 230, 231-232, 26 S. Ct. 29, 30, 50 L. ed. 163, 166 (1905);

Rawlings v. Ray, 312 U. S. 96, 99, 61 S. Ct. 473, 474, 85 L. ed. 605, 608 (1941);

Fisher v. Whiton, 87 L. ed. (Adv. Ops.) 167 (Dec. 7, 1942).

The same impelling considerations, it is submitted, require review of the state court action in the case at bar. For if there exists any federal institution that this Court should ever protect and preserve inviolate, it is the full faith and credit clause—the "federal clause."

Fifth—Weighed with the importance of the "federal clause," this Court's burden in reviewing cases arising under Article IV, Section 1, seems light indeed.[4]

The preservation of the right is vested in this Court. This all important judicial function in the national system

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[4]Hart, The Business of The Supreme Court at the October Terms, 1937 and 1938 (1940), 53 Harv. L. Rev. 579, 593;
Frankfurter and Fisher, The Business of The Supreme Court at the October Terms, 1935 and 1936 (1938), 51 Harv. L. Rev. 577, 601;
Frankfurter and Hart, The Business of The Supreme Court at the October Term, 1934 (1935), 49 Harv. L. Rev. 68, 81;
Frankfurter and Hart, The Business of The Supreme Court at the October Term, 1933 (1934), 48 Harv. L. Rev. 238, 251;
Frankfurter and Hart, The Business of The Supreme Court at the October Term, 1932 (1933), 47 Harv. L. Rev. 245, 261.

is especially significant where, as in the case at bar, no federal court has passed upon the full faith and credit question prior to request for review here.

It was not intended that so fundamental a right be left to the mercy of the courts of the several states. As Mr. Justice Black observed in *Kalb v. Feuerstein*, 308 U. S. 433, 439, 60 S. Ct. 343, 84 L. ed. 370, 374 (1940):

> "The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land."

It is of little consequence whether the petitioner here collects the money in suit. But it is of the greatest consequence that the courts of California be not permitted to deny full faith and credit to the public acts of Ohio, and thus defy the mandate of the Constitution of the United States.

At all times—and particularly in these times—the Supreme Court of the United States should demonstrate that the "federal clause" remains ever a nation-wide unifying force. As Mr. Justice Holmes pointed out with respect to Article IV, Section 1, "there is no exception in the words of the Constitution."[5]

The assessment at bar, being a substantive right conferred by Ohio statute, is entitled to the same faith and credit in California as in Ohio. The courts of Ohio con-

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[5]*Haddock v. Haddock*, 201 U. S. 562, 632, 633, 26 S. Ct. 525, 50 L. ed. 867, 895, 896 (1906).

sistently recognize and enforce the obligations of bank stockholders arising from the Ohio Superintendent's assessments. Thus, California's refusal to recognize and permit suit upon the Ohio Superintendent's statutory cause of action constitutes a rank denial of full faith and credit to the public acts of Ohio.

Broderick v. Rosner, 294 U. S. 629, 643, 644, 55 S. Ct. 589, 79 L. ed. 1100, 1107, 1108 (1935).

The liability of stockholders of an Ohio state bank may not be "a federal question of substance." *But California's unconstitutional denial of full faith and credit to the public acts of Ohio indisputably is.*

With the question as now presented, it is hoped that this Honorable Court will again read the petition for certiorari and the supporting brief. And it is believed that upon such reconsideration, the irrefutable logic of the opinion of the dissenting justices of the California Supreme Court will be given approval here. [R. 63-69.]

Conclusion.

For the foregoing reasons, your petitioner, the Superintendent of Banks for the State of Ohio, respectfully urges that a rehearing be granted; that upon further consideration, the order of February 1, 1943, denying certiorari, be vacated; that the writ of certiorari issue as prayed for;

and that the judgment of the Supreme Court of the State of California be, upon further consideration, reversed.

Respectfully submitted,

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Of Counsel.

Certificate of Counsel.

I, WILLIAM C. MATHES, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

WILLIAM C. MATHES,
Counsel for Petitioner.